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No. 90-1550

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ANNIE LEE HUDSON, *et alia*,

Petitioners,

v.

CHICAGO TEACHERS UNION, LOCAL NO. 1, *et alia*,

Respondents.

On petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Petitioners Annie Lee Hudson *et alia* ("the teachers") hereby reply to the four major mistakes in respondents' brief in opposition.

ARGUMENT

I. Respondents echo the error in the Court of Appeals' and District Court's decisions that the teachers are challenging "the calculation" of the "fair-share fee"—that is, its arithmetical amount, rather than "the constitutional adequacy" of the "fair-

share" notice *sub judice* (FSN-3)—that is, the legal (im)propriety and economic (non)rationality of the underlying method the unions used to calculate the fee.[1] The short rejoinder to respondents' complaint is that the lower courts could and should have addressed the teachers' arguments without "calculating", or even taking the first step in "calculating", the "fair-share fee" at all, in the sense of arriving at a final number, correct or incorrect, for that fee.

One need not determine what the correct fee actually is to know that a "fair-share" notice predicated on legally faulty definitions of "collective bargaining"[2] will necessarily be inaccurate. Neither need one determine what the correct fee actually is to know that a notice structured around an economically incompetent method for cost-allocation[3] cannot possibly arrive at the right answer for the fee. Nor need one determine what the correct fee actually is to know that a notice exhibiting inadequate auditors' "verifications"[4] cannot satisfy *Hudson*'s[5] requirement that a reliable independent check of the unions' calculation appear in the notice itself (even if that calculation ultimately were to prove accurate). And this Court in *Hudson* did not determine what the correct fee was under the unions' original "fair-share" notice (FSN-1) when it implicitly held unconstitutional the unions' "*residuum*" theory for calculating that fee.[6]

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[1] *See* Brief in Opposition ("BIO") at 6-8.

[2] *See* Petition ("PET") at 6-8.

[3] *See id.* at 8-9.

[4] *See id.* at 9-11.

[5] Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986).

[6] *See* PET at 19-20.

So, respondents' claim that the teachers seek "to collapse the tripartite notice/arbitration/escrow procedure * * * established in *Hudson*"[7] itself collapses for two reasons: (i) It is operationally unnecessary to "calculate" the fee to conclude that FSN-3 is invalid because it rests on legal, economic, accounting, and other methodological errors—and, therefore, the lower courts were wrong to hold that they should not address the methodological problems with FSN-3 because to do so would supposedly impinge on the role of the "impartial decisionmaker". And (ii) this Court in *Hudson* invalidated FSN-1 precisely because of that notice's methodological errors, without "calculating" the correct fee or "collapsing the tripartite * * * procedure" the Court established in that very decision—thus proving that the lower courts' reluctance to address the teachers' arguments amounts to evasion and repudiation, not implementation, of *Hudson*.

II. Equally faulty for at least two reasons is respondents' theory that an issue of exhaustion is "not properly raised before this Court" because in the lower courts the teachers challenged only "the *adequacy* of the notice" and not "[t]he *accuracy* or legitimacy of the specific dollar changes [*sic*] itemized in the union's notice".[8]

First, the plainly inescapable fact is that the teachers raised numerous methodological objections to the constitutionality of FSN-3; and the lower courts refused to address on the merits any of these objections, on an exhaustion-rationale:

> *District Court*—"[T]he court finds [the teachers'] objections to the fee's derivation largely irrelevant. By making these objections in this forum, [the teachers] are simply wasting their breath—and this court's time."[9]

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[7] BIO at 8.

[8] *Id.* at 8 n.4.

[9] Appendix to Petition ("APP") at 33a.

> *Court of Appeals*—"[The teachers] have advanced a plethora of objections to the CTU's methods for calculating the fair share fee amount. We need not pass on their merits because the proper forum for these objections is before the independent arbitrator, not before this court."[10]

Under the very decisions respondents wrongly cite, these explicit rulings by both lower courts bring the issue of exhaustion squarely before this Court.[11]

Second, according to respondents' own notion that challenging the methodological adequacy of FSN-3 in reality and unavoidably challenges the calculational accuracy of the fee, no logical or meaningful legal distinction exists between the teachers' attack (in respondents' words) on "the *adequacy* of the notice" and an attack on "[t]he *accuracy* * * * of the specific dollar cha[r]ges" in FSN-3. For that reason, according to respondents' own theory, when the teachers challenged the "notice" they were *ex necessitate* also challenging the "cha[r]ges"—indeed, by respondents' lights, a challenge to the "notice" inexorably reduces to a challenge to the "char[g]es". And, therefore, the lower courts' invocations of exhaustion with respect to the ultimate, underlying, and controlling issue of the "cha[r]ges" (or the calculation of the fee) were inescapably invocations of exhaustion with respect to the issue of the "notice". Surely respondents cannot be suffered simultaneously to argue both that the teachers' challenge to the "notice" is actually—ineluctably—a challenge to the "cha[r]ges" and that, notwithstanding this inextricable interrelationship

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[10] *Id.* at 21a.

[11] *E.g., see* Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970): "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." Self-evidently, where the Court of Appeals not only "consider[s]" an issue, but also explicitly relies on its ruling with respect to that issue as the *ratio decidendi* for denying the teachers' claims, the issue is a proper one for review by writ of certiorari.

between the two issues, the lower courts' reliance on the doctrine of exhaustion supposedly with respect to the issue of the "cha[r]ges" in no way implicates an exhaustion-ruling on the issue of the "notice"!

Respondents' careful avoidance of any reference to the actual, unmistakable holdings of the lower courts on exhaustion; the puerile double-dealing in the arguments they assert, now completely conflating, now totally separating the issues of "notice" and "cha[r]ges"; and the studied demotion to treatment in a mere footnote in their brief of the exhaustion-problem all emphasize their worried recognition that that issue deserves and demands review here, as the unavoidable next step in the evolution of the *Hudson* doctrine.[12]

III. Respondents pretend that the teachers are attempting to constitutionalize "the accounting or economic theories of [their] less-famed experts", and that these theories have already been rejected by this Court.[13] On both counts, respondents err.

First, the teachers seek merely a judicial hearing on and determination as to whether FSN-3 satisfies rational accounting and economic standards. Surely, the First Amendment (as well as the Due Process Clause of the Fourteenth) requires that a "fair-share" notice meet some ascertainable level of competence with respect to these (as well as other applicable) disciplines—as *Hudson* teaches, in its rejection of the unions' "*residuum*" theory as a defense for FSN-1.[14] In the event, the teachers may be unable to convince the trier of fact that FSN-3 falls below minimum standards in these regards. But, notwithstanding that

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[12] *See* PET at 28.

[13] BIO at 9-10 & n.5.

[14] *See* PET at 19-20.

possibility, they retain an *absolute* procedural-due-process right to be heard,[15] which the lower courts have abridged.

Second, this Court has not approved the entirety of the unions' definitions of what constitutes "collective-bargaining" (and therefore "chargeable") activities. To the contrary: both *Ellis*[16] and *Abood*[17] plainly reject many of the most important of these definitions.[18] Similarly, this Court has not adopted a "subtractive" formula for calculating "fair-share" fees, by which a union may deduct from its normal membership dues what it unilaterally concedes are "political" (or otherwise nonchargeable) expenditures, and treat the remainder as presumptively chargeable to nonunion employees. To the contrary: *Hudson* itself condemned such a "*residuum*" theory in no uncertain terms.[19] And this Court has never held, and surely would never hold, that an accountant's "verification" is necessarily sufficient under *Hudson* simply because it appears in the form of "'the highest level of review' * * * known to the accounting profession".[20] For this Court is aware that an accountant's "verification" can be both unqualified and nonetheless dead wrong, where (as here) the accountant (even inadvertently) uses legally improper definitions of "collective bargaining", employs an economically incompetent method of cost-allocation, gives nonunion employees

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[15] *See* Carey v. Piphus, 435 U.S. 247, 266 (1978).

[16] Ellis v. Railway Clerks, 466 U.S. 435 (1984).

[17] Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

[18] *See* PET at 6-7.

[19] *See id.* at 19-20.

[20] *Pace* BIO at 10 n.5.

inadequate disclosure, and uncritically relies on unsubstantiated data.[21]

IV. Finally, respondents argue that no conflict exists among the Circuit Courts and State courts over the issues addressed by the lower courts in this case.

Conveniently, respondents ignore those decisions squarely holding that exhaustion is not required in "fair-share-fee" cases, in direct opposition to the opinions of the lower courts here.[22]

Respondents also err in characterizing as "not remotely in point"[23] the cases the teachers cite for the proposition that a federal court may inquire into whether a "fair-share-fee" notice contains, for example, proper definitions of "chargeable" activities. In *Tierney*, the Court of Appeals for the Sixth Circuit held that the union's "procedures are constitutionally deficient under *Hudson*" because

> the plan returns to dissenters only that portion of union dues expended for *ideological* purposes unrelated to the collective bargaining agreement, while under *Hudson* and *Ellis*, the union must refund the proportion of the fee not related to the negotiation and operation of the collective bargaining agreement.[24]

That is, the union's procedures were unconstitutional at the "notice" level because they embodied a legally incorrect defini-

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[21] *See* PET at 7-8 & n.22-23, 8-9 & nn.24-28 (especially note 27), and 9-11 & nn.29-33.

[22] Tierney v. City of Toledo, 917 F.2d 927, 939-40 (6th Cir. 1990); Gibney v. Toledo Bd. of Educ., 40 Ohio St. 3d 152, 154-57, 532 N.E.2d 1300, 1303-05 (1988), *cited for an entirely different proposition in* BIO at 12-13.

[23] BIO at 13.

[24] Tierney v. City of Toledo, 824 F.2d 1497, 1505, 1506 (6th Cir. 1987).

tion of "chargeable" activities. This is precisely what the teachers contend is wrong with FSN-3 (among other demerits).[25] If the *Tierney* court was correct to hold that such a deficiency in a "fair-share-fee" collection-procedure justifies federal-court intervention prior to the nonunion employees' resort to an internal union appeals-process, then the lower courts in this case must be in error. Certainly a palpable conflict exists between the two decisions.

Similarly, in *Schneider*, the First Circuit Court of Appeals also held that a mandatory-fee scheme "does not * * * meet constitutional standards" because "[i]t defines too broadly the range of activities that may be funded with compulsory dues".[26] Again, this is precisely one of the teachers' complaints against FSN-3. If *Schneider* is correct, the lower courts here are not. Thus, the conflict could not be more obvious.

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[25] PET at 6-8.

[26] Schneider v. Colegio de Abogados de Puerto Rico, 917 F.2d 620, 640 (1st Cir. 1990).

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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